

**IN THE HIGH COURT OF FIJI
AT SUVA**

Winding Up Action No. HBE 12 of 2015

**IN THE MATTER of MODERN
INVESTMENT SERVICES LIMITED**

AND

**IN THE MATTER of the
COMPANIES ACT (Cap 247)**

BEFORE : **Master Vishwa Datt Sharma**

COUNSEL : **Ms. Kunatuba** : for the Petitioner
: **Mr. Singh** : for the Respondent
: Mr. Nilesh Prasad : for supporting creditor (Kasabias)
: Mr. Shane. K : for supporting creditor (Quality Aluminum)

Date of Hearing : **30th March, 2016**
Date of Judgment : **31st May, 2016 at 11.30 am**

INTERLOCUTORY RULING

(Leave and enlargement of time to file an affidavit in opposition)

APPLICATION

1. The Respondent Company, **Modern Investment Services Limited**, filed a **Notice of Motion** together with an **Affidavit in Support** on 13th October, 2015 and sought for the following Orders:

- (i) **That time allowed for filing of an Affidavit In Opposition be enlarged;**
 - (ii) **That the Respondent Company be granted leave to file an Affidavit In Opposition; and**
 - (iii) **Costs of this application be in the cause.**
2. This application was made pursuant to **Section 201 of the Companies Act [Cap 247]**.
 3. This application was **opposed** by the Petitioning Company and thus filed An **Affidavit Response** on 16th October, 2015.

THE LAW

Enlargement or abridgment of time

S.201. The court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.

RESPONDENT’S CASE

4. The Respondent filed an Affidavit in Support of Anand Kumar to his application as well as a reply to the Affidavit in Opposition filed by Faiz Hussein.
5. The Respondent explains the following at paragraph 6 and 8 of his Affidavit In Reply-
 - (i) *The Reason why the debt was admitted by annexure FH2 is because the applicant and its shareholders at the time of the issuance of the s. 221 notice did not have in their custody any evidence to dispute the claim;*
 - (ii) *The said evidence to dispute the claim by the respondent is now in the custody of the applicant;*

- (iii) *The delay in obtaining the said evidence was occasioned because the evidence is the form of the minutes of a meeting held between me and former clients of the applicant;*
- (iv) *That the business relationship between the applicant and its former clients was severed due to the supply of goods of an unmerchantable quality by the respondent and the evidence of this could not be obtained by the applicant because of the severance of the business relationship between the applicant and its former clients;*
- (v) *That subsequent to obtaining the evidence to dispute the claim by the respondent the applicant through its Solicitors Messers. Neel Shivam Lawyers immediately wrote to the Solicitors for the respondent indicating that the claim was disputed. Annexed and marked 'AK1' are the meeting minutes and letters written to Ms. Lateef & Lateef disputing the debt.*
- (vi) *At paragraph 8 further states that the enlargement of time application will put all matters in relation to this action properly before the Court for a just and proper determination.*

PETITIONER'S CASE

- 6. *The Petitioning Creditor, **Metromix Concrete (Fiji)**, issued a **Section 221 Notice** to the Respondent Company on 2nd February, 2015.*
- 7. *Solicitors for the Respondent Company on 16th March, 2015, wrote to the Petitioning Creditor Solicitors, acknowledging the Respondent Company's debt and sought time to settle the entire debt.*
- 8. *After non- payment of the debt as per the section 221 notice, the Petitioning Creditor proceeded to file its Winding Up Petition on 15th April, 2015 and its Affidavit Verifying Debt on 17th April, 2015.*
- 9. *The Winding up Petition and the Affidavit Verifying Debt was served to the Respondent Company on 21st April, 2015 and an affidavit of Service was filed on 29th April, 2015 to this effect.*

10. *The Respondent Company did not make an appearance until 17th September, 2015 where a request was made, from the bar table, for time to file the Respondent Company's Affidavit in Opposition.*
11. *The Solicitors for the Respondent Company filed a Notice of Motion for the enlargement of time. The First Call of the Notice of Motion was 19th October, 2015. By the first call, the Petitioning Creditor had already filed an Affidavit in Opposition to the Notice of Motion. An Affidavit in Reply was not filed by the Respondent Company until 19th November, 2015. This, however, was defective as the copy served on the Solicitors for the Petitioning Creditor had the deponent sign on the jurat of the annexure and the annexure itself was missing a document.*
12. *The debt claimed in the Winding Up petition is \$48,795.85. Apart from this the Petitioner is incurring extra costs for their Solicitors appearances especially for applications as frivolous as this.*
13. *Furthermore, this Summons is to correct an error made by the Respondent's Solicitors. The failure of the Respondent Company's Solicitors to exercise reasonable care and diligence in performing their tasks is not the fault of the Petitioning Creditor. Allowing this Summons will cause unjust prejudice against the Petitioning Creditor and punish the Petitioning Creditor for the Respondent Company's failure to exercise reasonable care and diligence.*
14. *It is obvious and clear that this is an attempt to delay proceedings, an abuse of process and that the Petitioning Creditor is unfairly prejudiced. Summons filed on 4th February, 2015 by the Respondent Company be dismissed with costs.*

ANALYSIS and DETERMINATION

15. The application before this Court is made by the Respondent Company pursuant to **Section 201 of the Companies Winding up Rules**, seeking an order for **leave and enlargement of time to file its Affidavit in Opposition.**

Section 201 states - "**The court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.**

(Underline is mine)

16. The **Winding up Rules** govern the **Winding up Proceedings** and the **Rule** with respect to the filing of an Affidavit in Opposition is clear. **Rule 31 (1) of the Winding up Rules** states-

'Affidavits in opposition to a petition shall be filed within 7 days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every such affidavit shall be given to the petitioner or his barrister and solicitor on the day on which such affidavit is filed.'

(Underline is mine)

17. It has become appropriate at this stage that I resort myself to the court record and find out how the proceedings were filed and pursued.
18. Firstly, I refer to the demand Notice in terms of **section 221** which was issued and served onto the Respondent Company on 2nd February, 2015.
19. Upon the service of the demand notice, the Respondent Company needed to respond immediately in terms of the debt sought for by the Petitioning Creditor. If the Respondent Company neglects to pay the sum so due and the Company has, for 3 weeks thereafter neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the Creditor, the Respondent Company shall be deemed to be unable to pay its debt.

Reference is made to the annexure marked '**FH 2**' within the Affidavit in Opposition of Faiz Hussein, filed on 16th October, 2015. The Respondent Company's Solicitors wrote to the Solicitors for the Petitioning Creditor on 16th March, 2015, **acknowledging the Respondent Company's debt and sought time to settle the entire debt.**

20. The Winding Up Petition in the within action was issued on 15th April, 2015 and thereafter filed its Affidavit Verifying Petition as to debt on 17th April, 2015. Served of these documents were effected onto the Respondent on 21st April, 2015.

21. It is noted that no **Affidavit in Opposition** was filed so far to this proceedings. **Rule 31 (1) of the Winding Up Rules** is compulsory wherein it requires the Respondent Company to **file its Affidavit in Opposition to the petition within 7 days of the date on which the affidavit verifying the petition is filed.**

The Affidavit Verifying Petition was filed in this case on 17th April, 2015. Therefore, the as per the aforesaid Rule, the affidavit in Opposition should have been filed within 7 days from 17th April, 2015, on or 24th April, 2015. This was not done.

22. However, the Petitioner proceeded to fully comply with all the requirements of the Winding Up proceedings and thus filed in their Memorandum of Due Compliance (MODC) pursuant to **Rule 28 (1) of the Companies (Winding Up) Rules 1983** on 11th September, 2015 and thereafter a List of Parties Attending the Hearing of a Petition in terms of the set down **Rule 30 of the Companies (Winding Up) Rules, Cap 247** on 12th October, 2015 respectively.
23. The court record further reveals that Mr. Singh from Neel Shivam Lawyers appeared in court as a watching brief on 01st September, 2015. No formal appearance was made by him on behalf of the Respondent Company for the reasons best known to them. This court also noted from the records that no notice of appointment of Solicitors was filed by him. Matter adjourned for mention to 17th September, 2015.
24. On 17th September, 2015, Mr. Singh made an appearance for the Respondent Company and admitted not filing any Affidavit in Opposition explaining that it was out of time. Matter was adjourned to 13th October, 2015 for mention to find out the status of the case.

Again, on 13th October, 2015, Mr. Singh informed this court **"We wish to file our affidavit in opposition out of time. Set a date for hearing even if we have not filed any affidavit in opposition."**

On the other hand, Counsel for the petitioner sought for a winding up order in absence of any affidavit in opposition.

However, this court had the matter stood down till 2.30 pm to make a decision whether the Respondent Company should be granted sometime to file and serve their affidavit in opposition or not.

The court gave a short ruling citing reasons **'this court cannot just prima facie without hearing the Respondent Company accede to the winding up order. 3 days was granted to the Respondent to file and serve their affidavit in opposition and matter for mention on 19th October, 2015 for further directions.'**

Instead of complying with the court directions of 13th October, 2015, to file and serve an affidavit within 3 days, the Respondent chose to file two consecutive interlocutory applications as follows-

- (a) **Notice of Motion with an Affidavit in Support dated 13th October, 2015 - seeking an order for leave and enlargement of time to file an Affidavit in Opposition;**
- (b) **Summons with an Affidavit in Support dated 04th February, 2016- seeking an order for leave to file an amended Affidavit in Reply of Anand Kumar filed on 19th November, 2015.**

The application dated 4/2/2016 was struck out by court on 30/03/2016 upon the non-compliance by the Respondent wherein he failed to file his reply and unless order imposed then was activated accordingly.

On the same date, the second application dated 13th October, 2015- seeking leave of court and enlargement of time to file affidavit in opposition, which is the current application before this court was heard on 30th March, 2016.

25. I reiterate ***Section 201 of the Companies Winding up Rules;***

'The court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.

Further, in considering the Respondent's application for leave and enlargement of time for filing of an Affidavit in Opposition, I make reference to a passage from the ***Privy Council Judgment*** in the case of ***Ratnam v, Coomaraswamy and Another [1964] 3 ALL. E.R. 933 at 935*** as follows-

'The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.'

26. By a simple reading of **Section 201** together with the case of **Ratnam v, Coomarswamy & Another**, it gives this court the discretion to grant an extension to the time period. However, this discretion is to be exercised judiciously without any prejudice to parties to this proceeding.


In order for this Court to be persuaded in acceding to the application for leave and enlargement of time in terms of the Respondent's application, substantial reasons needed to be advanced rather than just stating *'at the time of filing of the Petition, the applicant was in the course of defending another winding up action HBE 65 of 2014, and subsequently, permanent stay was granted. Further, the Respondent indicated to the Petitioner's Solicitors that the debt was disputed.'*

In the present case, I reiterate that the Petition was filed 15th April, 2015. Upon service of the said Petition, the Respondent Company's Solicitors, wrote to the Petitioning Creditor Solicitors on 16th March, 2015, **acknowledging the Respondent Company's debt and sought time to settle the entire debt**. Hence, the Respondent should have pursued to liaise with the Petitioner and settle the debt that they have acknowledged. Instead the Respondent files an interlocutory Motion on 13th October, 2015 seeking leave and enlargement of time to file the Affidavit in Opposition. The Respondent was fully aware of the service of the Demand Notice in terms of **Section 221**, thereafter the Winding Up Petition and the Affidavit Verifying Petition accordingly. The Respondent continued in failing to file and serve their Affidavit in Opposition even when this court on 13th October, 2015 granted them 3 days to do so. Thus, the Respondent was granted ample opportunity instead, they detoured from this order and thought fit to file two consecutive interlocutory applications causing undue delay to the Petitioner's substantive Winding Up application. Further, it should be noted that there are two other supporting creditors to the Petitioners Winding Up Petition application and the conduct of the Respondent herein is causing substantial delay to the Winding up proceedings unnecessarily.

27. For the aforesaid rational, I do not find any substantial reasons have been cited to justify its application before this court and therefore in the given circumstances, this court is not in a position to accede to the Respondent's application. I find that the conduct of the Respondent clearly shows a **delay tactic** to the Petitioner's Winding Up Petition filed on 15th April, 2015.
28. I make the following Orders-
- (i) **The Respondent Company's application dated 13th October, 2015 seeking leave and enlargement of time to file the Affidavit in Opposition is hereby dismissed.**
 - (ii) **The Winding Up Petition be heard and Determined.**
 - (iii) **Costs is summarily assessed against the Respondent in the sum of \$1,000.**

Dated at **Suva** this **31st Day of May, 2016**




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Ms. Kunatuba of Law Solutions, Suva*
Mr. Singh of Neel Shivam Lawyers, Suva.
Mr. Nilesh Prasad of Mitchell Keil Lawyers, Suva.
Mr. Shane. K of AP Legal, Suva.